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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MARCOS ANTONIO FELIX, Appellant.	2 CA-CR-2009-0001 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20074410

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson — Tucson
Attorneys for Appellee

Natasha Wrae — Tucson
Attorney for Appellant

B R A M M E R, Judge.

¶1 Marcos Antonio Felix appeals his convictions and sentences for drive-by shooting and six counts of endangerment. He argues the trial court erred by denying his

motion to sever his trial from that of his codefendant Michael Garcia, that the evidence was insufficient to support his convictions "under an accomplice liability theory," and that the court erred by refusing to order the state "to disclose the notes taken by the [investigating] detective during the trial." We affirm.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining Felix's convictions and sentences. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On October 27, 2007, Felix and Garcia, both gang members, were parked at a gas station in Felix's car. A truck pulled into the station's parking lot, carrying several people associated with a different gang or gangs than the one with which Felix and Garcia were associated. After the truck drove from the lot, Felix followed it in his car, with Garcia still as a passenger. The driver of an SUV blocked the truck by stopping in front of it. Felix pulled alongside the truck, and Garcia pointed a gun at the truck. Garcia and the SUV's driver exchanged gunfire with a person in the truck. M., who had been riding in the back of the truck, was shot and killed. Garcia later told the SUV's driver that he had shot M.

¶3 A grand jury charged Felix with second-degree murder, drive-by shooting, and six counts of endangerment with a substantial risk of imminent death. Garcia was charged with first-degree murder and the other offenses with which Felix had been charged. At the conclusion of their ten-day trial, the jury acquitted them of the respective murder charges but found them guilty of the remaining counts. The trial court sentenced

Felix to presumptive, concurrent terms of imprisonment, the longest of which was 15.75 years. This appeal followed.

Discussion

Severance

¶4 Felix first contends the trial court committed reversible error by joining sua sponte his and Garcia's trials, and thereafter denying Felix's motions to sever. We review a trial court's decision on joinder and severance for an abuse of discretion. *State v. LeBrun*, 222 Ariz. 183, ¶ 5, 213 P.3d 332, 334 (App. 2009), *citing State v. Prince*, 204 Ariz. 156, ¶ 13, 61 P.3d 450, 453 (2003). Rule 13.3, Ariz. R. Crim. P, which permits joinder, provides:

> (b) **Defendants.** Two or more defendants may be joined when each defendant is charged with each offense included, or when the several offenses are part of a common conspiracy, scheme or plan or are otherwise so closely connected that it would be difficult to separate proof of one from proof of the others.

¶5 In contrast, Rule 13.4, which permits severance, provides as follows:

> (a) **In General.** Whenever 2 or more offenses or 2 or more defendants have been joined for trial, and severance of any or all offenses, or of any or all defendants, or both, is necessary to promote a fair determination of the guilt or innocence of any defendant of any offense, the court may on its own initiative, and shall on motion of a party, order such severance.

¶6 A trial court abuses its discretion in denying a motion to sever if the defendant can establish that, at the time the defendant moved to sever, he had demonstrated to the trial court that the failure to sever would result in "'compelling

prejudice.'" *State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995), *quoting State v. Cruz*, 137 Ariz. 541, 544, 672 P.3d 470, 473 (1983). Compelling prejudice occurs when:

> (1) evidence admitted against one defendant is facially incriminating to the other defendant; (2) evidence admitted against one defendant has a harmful "rub-off effect" on the other defendant; (3) there is a significant disparity in the amount of evidence introduced against each of the two defendants; or (4) co-defendants present defenses that are so antagonistic that they are mutually exclusive, or the conduct of one defendant's defense harms the other defendant.

State v. Grannis, 183 Ariz. 52, 58, 900 P.2d 1, 7 (1995) (citations omitted).

¶7 Here, the trial court "consolidated [Felix's and Garcia's cases] for purposes of hearing," noting that defense counsel later could file a motion to sever. *See* Ariz. R. Crim. P. 13.3(c) (permitting sua sponte consolidation of offenses and defendants if "the ends of justice will not be defeated thereby"). Four days before trial, Felix moved to preclude the introduction of "all jail phone calls and any statements made by co-defendants [Garcia] and [Felix]." The court heard argument on Felix's motion on the first day of trial. Construing Felix's motion to be, in part, a belated motion to sever, the court denied it.[1] On the fifth and sixth days of trial, Felix renewed his motion to sever. The court explicitly denied the former request, and implicitly denied the latter.

[1]"A defendant's motion to sever offenses or defendants must be made at least 20 days prior to trial . . . and, if denied, renewed during trial at or before the close of evidence." Ariz. R. Crim. P. 13.4(c). Felix's untimely motion was made but four days before trial. Although "[s]everance is waived if a proper motion is not timely made and renewed," *id.*, the trial court addressed Felix's motion on its merits. We, therefore, review the court's disposition for an abuse of discretion.

¶8 Felix asserts on appeal that "any incriminating statements . . . Garcia made were facially incriminating to [Felix]." He provides one example of a statement he contends was incriminating. However, Felix's general reference to "any incriminating statements" is insufficient to preserve his complaint about any statements he has not identified specifically. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellate brief argument shall contain "citation to the authorities, statutes and parts of the record relied on"); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (claims waived for insufficient argument on appeal).[2]

¶9 Felix refers specifically only to "Garcia's jail [tele]phone call discussing the 'black bitch.'" At trial, a witness testified that in a video-recorded jail visit, Garcia had told his girlfriend to tell someone else "to keep the black bitch safe." The witness further explained that the "black bitch" Garcia referred to likely was a black firearm.

¶10 Relying on *Bruton v. United States*, 391 U.S. 123 (1968), Felix concludes that Garcia's statement on its face was incriminating to him, thereby causing compelling prejudice. In *Bruton*, the Court held that a defendant's right to confrontation is violated when a non-testifying codefendant's facially-incriminating confession is admitted, even if

[2]Although he does not cite to the relevant portions of the record, Felix asserts his argument nonetheless is sufficient. But, the failure to provide appropriate citations to the record violates Rule 31.13(c)(1)(vi), and thus constitutes insufficient argument. Felix further requests that, notwithstanding his insufficient argument, we search the record for fundamental error. We are not required to do so unless counsel has filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). *See State v. Banicki*, 188 Ariz. 114, 117-18, 933 P.2d 571, 574-75 (App. 1997); *see also* 1995 Ariz. Sess. Laws, ch. 198, § 1 (repealing A.R.S. § 13-4035, formerly requiring fundamental error review). We therefore decline Felix's request.

the jury is instructed to consider the confession only against the codefendant. *Bruton*, 391 U.S. at 123-24, 137.

¶11 Although Garcia did not mention Felix, Felix contends the statement's admission violates *Bruton* because it "necessarily places . . . Garcia in [Felix]'s vehicle with a gun and suggests that the gun was fired." Thus, it "implicates Felix under the accomplice liability theory with no opportunity to cross examine . . . Garcia." Felix misunderstands *Bruton*. The admission of a non-testifying codefendant's confession, which is not facially incriminating and does not "'expressly implicate[]'" the defendant, does not violate the defendant's right to confrontation when an appropriate limiting instruction is given. *Richardson v. Marsh*, 481 U.S. 200, 208 (1987), *quoting Bruton*, 391 U.S. at 124 n.1; *see also State v. Blackman*, 201 Ariz. 527, ¶ 52, 38 P.3d 1192, 1205 (App. 2002). A confession does not implicate a defendant expressly if it becomes incriminating only when linked with other admitted evidence. *Richardson*, 481 U.S. at 208.

¶12 Here, Garcia's statement "to keep the black bitch safe" was not a confession. And even if *Bruton* applies to incriminating statements that are not confessions, nothing on the face of Garcia's statement incriminated Felix. Moreover, the court properly instructed the jurors to "consider the charge against each defendant separately," and that "[e]ach defendant is entitled to have his guilt or innocence as to each crime charged determined from his own conduct and from the evidence which applies to him as if he were being tried alone." Because the jury was so instructed, "[it] is

presumed to have considered the evidence against each defendant separately in finding both guilty." *Murray*, 184 Ariz. at 25, 906 P.2d at 558.

¶13 Felix maintains "any incriminating statement of . . . Garcia would be inherently incriminating to [Felix] under an accomplice theory given the position and relationship of the defendants to each other." To be sure, if evidence demonstrated Felix acted as Garcia's accomplice, evidence tending to incriminate Garcia for the charged offenses would also tend to incriminate Felix. *See* A.R.S. §§ 13-301, 13-303. Garcia's statement was incriminating only to himself, if at all. It did not incriminate facially, or implicate expressly, Felix as his accomplice. Thus, it was not "facially incriminating" pursuant to *Bruton.* *See Bruton*, 391 U.S. at 123-24, 137 (Sixth Amendment violated where codefendant confessed he and defendant committed armed robbery, later implicating but refusing to name accomplice); *Cf. United States v. Truslow*, 530 F.2d 257, 259-60 (4th Cir. 1975) (*Bruton* violated where codefendant's statement directly implicated defendant in conspiracy). Felix's Sixth Amendment rights were not violated here.

¶14 Felix further asserts the evidence admitted against Garcia had a harmful "rub-off effect" on him, there was a significant disparity in the amount of evidence introduced against him and Garcia, and he and Garcia presented antagonistic and mutually exclusive defenses. *See Grannis*, 183 Ariz. at 58, 900 P.2d at 7. Although he failed to raise these arguments below, Felix nonetheless contends "the motion to sever casts a net over all available grounds for severance," despite not having articulated those grounds explicitly. We disagree. As already noted, Felix can only establish the trial

court clearly abused its discretion if he can show that he had demonstrated that his defense would have been prejudiced absent severance. *See Murray*, 184 Ariz. at 25, 906 P.2d at 558, *citing State v. Atwood*, 171 Ariz. 576, 612, 832 P.3d 593, 629 (1992). Felix does not dispute he failed to raise these claims below, and thus we typically would review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). But Felix also fails to argue in his opening brief that the court committed fundamental error. He thus has waived these claims. *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (concluding argument waived because defendant "d[id] not argue the alleged error was fundamental").

¶15 The trial court properly consolidated Felix's and Garcia's trials because he and Garcia had been charged with each offense included[3] and the offenses were "so closely connected that it would be difficult to separate proof of one from proof of the others." Ariz. R. Crim. P. 13.3. Severance is warranted only if "necessary to promote a fair determination of the guilt or innocence of any defendant of any offense." Ariz. R. Crim. P. 13.4. Notably, a defendant cannot demonstrate such a necessity if, "even had there been separate trials, evidence as to one set of charges would have been admissible at the trial on the other set . . . ." *State v. Via*, 146 Ariz. 108, 115, 704 P.2d 238, 245 (1985). Had their trials been severed, Garcia's statement would have been admissible at Felix's trial because Felix was charged as Garcia's accomplice. *See* §§ 13-301, 13-303. Felix cites no authority, and we find none, for his assertion to the contrary.

[3]Although Felix was charged with second-degree murder and Garcia was charged with first-degree murder, they were both charged with murdering the same victim, M.

¶16 Because Garcia's statement was not a confession and on its face did not incriminate Felix as his accomplice, it could not have caused Felix substantial prejudice. Moreover, it would have been admissible even if Felix's trial had been severed from Garcia's. The trial court did not abuse its discretion in sua sponte joining Felix's and Garcia's trials, or in denying Felix's motions for severance.

Sufficiency of the Evidence

¶17 Felix next argues there was insufficient evidence to support his convictions. He contends there was no evidence he intended to "participate[], associate or concur[] with . . . Garcia in the commission of a drive by shooting which endangered the lives of others." His convictions plainly were based on accomplice liability because there was no evidence he had fired a weapon. *See* §§ 13-301, 13-303(A)(3). An accomplice is a person who, "with the intent to promote or facilitate the commission of an offense," either "[s]olicits or commands another person to commit the offense"; "[a]ids, counsels, agrees to aid or attempts to aid another person in planning or committing an offense"; or "[p]rovides means or opportunity to another person to commit the offense." § 13-301. Felix does not dispute that his conduct aided Garcia in committing the offenses here; he instead argues he lacked the requisite intent.

¶18 When addressing a challenge to the sufficiency of the evidence, we view the facts in the light most favorable to sustaining the verdict and resolve all inferences against the defendant. *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the

jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). And, it is the jury's function to weigh all of the evidence and to assess witness credibility. *State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43, 46 (App. 2004). Furthermore, in reviewing the record to determine whether substantial evidence existed to support a conviction, there is no distinction between circumstantial and direct evidence. *See State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993).

¶19 Intent may be, and typically is, proven by circumstantial evidence. *See State v. Routhier*, 137 Ariz. 90, 99, 669 P.2d 68, 77 (1983) ("Criminal intent, being a state of mind, is shown by circumstantial evidence."). The evidence here showed that Felix had pursued the truck from the gas station and stopped his car next to the truck in a manner that would have given Garcia an advantageous firing position. This conduct permits the inference Felix intended to aid Garcia in firing at the truck.

¶20 Any suggestion Felix had been unaware Garcia would shoot at the truck is belied by Felix's statement during a recorded telephone call he had made from jail:

> There's no more thinking about it. Don't you . . . think like before I drive it, I was like, . . . I'm going to turn, I'm going to turn right when I knew something was gonna go down? I was like, I'm going to turn, fool. And then I was—and then I just, like, damn, I kind of left those fools because they're behind, they're behind them other fools. Going to be able to . . . smoke th[em] out easy. And I was just like, you should—shhh—too late now. Don't you be—I . . . sit here thinking like that? Damn, I should have turned left, I shouldn't have turned right, I should never have went.

This statement suggests Felix apparently followed the truck precisely because he anticipated a violent confrontation might occur. When his conduct and this statement are

viewed together, they permit the conclusion Felix intended to bring his vehicle into a location where he and Garcia could participate in the confrontation.[4] Thus, sufficient evidence supported his convictions.

Disclosure of Trial Notes

¶21 During trial, Felix informed the trial court that the investigating detective had been taking notes and stated he "would like a copy of [the detective's] notes" before cross-examining him. The court denied that request as well as Felix's subsequent request that the court place the notes in the record "under seal for the appellate court to review." Felix asserts on appeal that these notes "were not attorney work product" and therefore "potential[l]y" would have been discoverable under *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963), which requires the state to disclose any evidence in its possession that tends to exculpate a defendant. *See also* Ariz. R. Crim. P. 15.1(b)(8). Thus, he reasons, the court violated his due process rights by refusing to seal the documents for appellate review.

¶22 This argument is meritless. First, Rule 15.4(b)(1) provides that "[d]isclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the prosecutor, members of the prosecutor's legal or investigative staff or law enforcement officers." Notes taken during trial plainly fall within this definition. *See* Ariz. R. Crim. P. 15.4(a) cmt. ("It is intended that an attorney's actual trial notes . . . will be

[4]To the extent Felix argues he and Garcia had to have formulated an explicit plan to conduct a drive-by shooting for the jury to find him guilty as an accomplice, he incorrectly states the law. *See* §§ 13-301, 13-303.

encompassed within the work product exception of Rule 15.4(b)(1).'"). The sole authority Felix relies on for his argument is *State v. Nunez*, 23 Ariz. App. 462, 534 P.2d 270 (1975). We commented in *Nunez* that a witness's statements during a pretrial interview, which had been recorded in the prosecuting attorney's notes, were not work product under Rule 15.4(b)(1). *Id.* at 463, 534 P.2d at 271. But nothing in that case suggests notes taken during trial, such as those he seeks here, are not work product or otherwise are subject to disclosure.

¶23 Moreover, nothing in the record suggests the notes contained any exculpatory information. Thus, they would not have been subject to mandatory disclosure under *Brady* or Rule 15.1(b)(8). *See State v. Montano*, 204 Ariz. 413, ¶ 53, 65 P.3d 61, 62 (2003) (*Brady* violation established if defendant demonstrates sealed materials exculpatory). Felix cites no authority, and we find none, requiring a trial court to order the preservation of documents based on the entirely speculative assertion they might contain exculpatory evidence. *See State v. Acinelli*, 191 Ariz. 66, 71, 952 P.2d 304, 309 (App. 1997) (speculation file might contain exculpatory information "'not sufficient to require a remand for *in camera* inspection, much less reversal for a new trial'"), *quoting United States v. Navarro*, 737 F.2d 625, 631 (7th Cir. 1984). For these reasons, the trial court did not err in denying Felix's request for the notes or his request that the notes be entered in the record and sealed for appellate review.

Disposition

¶24 We affirm Felix's convictions and sentences.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge